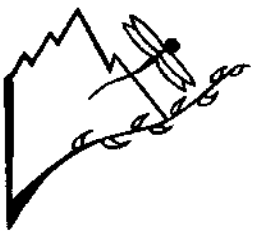

CENTER FOR NATIVE ECOSYSTEMS

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Selma Sierra
Bureau of Land Management
Utah State Office
PO Box 45155
Salt Lake City, Utah 84145

May 19, 2004

BY HAND-DELIVERY

Re: Protest of BLM's Notice of Competitive Oil and Gas Lease Sale of Parcels with High Conservation Value

Dear Ms. Sierra:

In accordance with 43 C.F.R. §§ 4.450-2; 3120.1-3, Center for Native Ecosystems ("CNE") protests the June 5th sale of the following parcels:

Price Field Office

We protest the sale of the following parcels that contain habitat for the bald eagle, which is a Utah State Wildlife Species of Concern, and a BLM sensitive species, and is listed under the Bald and Golden Eagle Protection Act:
UTU86170
UTU86171

We protest the sale of the following parcels that contain habitat for migratory birds:
UTU86171

Vernal Field Office

We protest the sale of the following parcels that contain habitat for the imperiled Duschesne milkvetch (*Astragalus duchesnensis*):
UTU86182

We protest the sale of the following parcels that contain habitat for the bald eagle, which is a Utah State Wildlife Species of Concern, and a BLM sensitive species, and is listed under the Bald and Golden Eagle Protection Act:
UTU86175
UTU86176

UTU86177
UTU86178
UTU86181
UTU86182

We protest the following parcels which contain habitat for sensitive raptors:
UTU86175
UTU86176
UTU86177
UTU86178
UTU86179
UTU86180
UTU86181
UTU86182

We protest the following parcels which contain greater sage-grouse habitat. Greater sage-grouse is a Utah State Wildlife Species of Concern and a BLM sensitive species.
UTU86178

We protest the following parcels which contain greater sage-grouse brooding and wintering habitat. Greater sage-grouse is a Utah State Wildlife Species of Concern and a BLM sensitive species.
UTU86179
UTU86180

We protest the following parcel which contains habitat for the Hamilton milkvetch (*Astragalus hamiltonii*), a BLM sensitive species.
UTU86178

We protest the following parcels which contain habitat for the ferruginous hawk. The ferruginous hawk is a UT State Wildlife Species of Concern and a BLM sensitive species
UTU86179
UTU86180

We protest the following parcels which contain habitat for the golden eagle. The golden eagle is protected under the Bald and Golden Eagle Protection Act.
UTU86179
UTU86180
UTU86182

We protest the following parcels which contain habitat for the burrowing owl. The burrowing owl is a UT State Wildlife Species of Concern, and a BLM sensitive species.
UTU86180

We protest the following parcels that contain white-tailed prairie dog habitat. The white-tailed prairie dog is a Utah State Wildlife Species of Concern and a BLM sensitive species.

UTU86180

We protest the following parcels that contain habitat for four special status plants (*Astragalus chloodes, Astragalus saurinus, Cymopterus duchesnensis, Eriogonum saurinum*):
UTU86182

We protest the following parcels that will impact lands within a Heart of the West Conservation Plan Core Area:
UTU86181

We protest the following parcels that will impact lands within a Heart of the West Conservation Plan Corridor:
UTU86181

The grounds for the protest follow.

I. PROTESTING PARTIES

Center for Native Ecosystems (CNE) has a longstanding record of involvement in management decisions and public participation opportunities on public lands including federal lands managed by the Bureau of Land Management (BLM). CNE's mission is to use the best available science to participate in policy and administrative processes, legal actions, and public outreach and education to protect and restore native plants and animals in the Greater Southern Rockies.

CNE has a well-established history of participation in BLM planning and management activities, including participation in Utah BLM oil and gas leasing decisions and the planning processes for the various UT BLM Field Offices. CNE's members visit, recreate on, and use lands on or near the parcels proposed for leasing. The staff and members of CNE enjoy various activities on or near land proposed for leasing, including viewing and studying rare and imperiled wildlife and native ecosystems, hiking, camping, taking photographs, and experiencing solitude. CNE's staff and members plan to return to the subject lands in the future to engage in these activities, and to observe and monitor rare and imperiled species and native ecosystems. We are collectively committed to ensuring that federal agencies properly manage rare and imperiled species and native ecosystems, as well as other lands of high conservation value. Members and professional staff of CNE are conducting research and advocacy to protect the populations and habitat of rare and imperiled species discussed herein. CNE's members and staff value the important role that Heart of the West Conservation Plan Core Areas and Corridors, and other areas of high conservation value, should play in safeguarding rare species and communities and other unique resources on public land. Our members' interests in these

public lands and the rare and imperiled species that depend on these lands for habitat will be adversely affected if the sale of these parcels proceeds, as proposed, without adequate environmental analysis or safeguards to protect the functionality of habitat for imperiled species or other important attributes of lands of high conservation value. Oil and gas leasing and subsequent mineral development on the protested parcels, if approved without adequate environmental analysis and appropriate safeguards to minimize negative impacts, is likely to result in significant, unnecessary and undue harm to rare and imperiled species, native ecosystems, and lands of high conservation value. The proposed leasing of the protested parcels will harm our members' interests in the continued use of those public lands and the rare and imperiled species they support. Therefore protestors have legally recognizable interests that will be affected and impacted by the proposed action.

II. STATEMENT OF REASONS

For the reasons set forth below, the Bureau of Land Management (BLM) should withdraw all of the protested parcels pending completion of an adequate NEPA analysis of the environmental impacts of the proposed leasing. BLM should withdraw from the sale all protested parcels because there is credible evidence of resource conflicts and potentially significant environmental impacts which have not been properly analyzed. The BLM should withdraw the protested parcels pending completion of a site-specific pre-leasing Environmental Assessment or Environmental Impact Statement that contains the following:

- adequate analysis of the potential direct, indirect, and cumulative impacts of reasonably foreseeable post-leasing development on rare and imperiled species, including greater sage-grouse, bald eagle, golden eagle, ferruginous hawk and burrowing owl, sensitive raptors, prairie dog, Duchesne milkvetch, Hamilton milkvetch, *Astragalus chloodes, Astragalus saurinus, Cymopterus duchesnensis,* and *Eriogonum saurinum*; and areas recognized by various entities as having high conservation value, particularly Heart of the West Conservation Plan Core Areas and Corridors.
- adequate consideration of a range of alternatives to ensure that impacts to the aforementioned lands and species are minimized, including no-leasing, no-surface occupancy, and a range of mitigation measures that could be applied as lease stipulations to minimize and mitigate impacts to the aforementioned special status species and areas of high conservation value.
- adequate analysis of the mitigation measures proposed to be applied as lease stipulations and lease notices, under each alternative, including an assessment of how effective mitigation measures are likely to be at mitigating impacts on the aforementioned special status species and lands of high conservation value, to insignificance (this analysis should include an assessment of the best available science on the effectiveness of any proposed mitigation measures, and of BLM's ability to require, monitor and enforce proposed mitigation measures given funding and personnel constraints)

- a record that demonstrates that BLM has adequately analyzed any potential direct, indirect, and cumulative impacts of reasonably foreseeable post-leasing oil and gas development on special status species (ESA listed threatened, endangered, and candidate species, and UT BLM and State sensitive species), including greater sage-grouse, bald eagle, golden eagle, ferruginous hawk and burrowing owl, sensitive raptors, prairie dog, Hamilton milkvetch, *Astragalus chloodes, Astragalus saurinus, Cymopterus duchesnensis,* and *Eriogonum saurinum.*
- a record that demonstrates that BLM has met the all of the applicable Endangered Species Act requirements for ESA listed species present in the area proposed for leasing, including completion of site-specific surveys to determine whether ESA listed species are likely to be present on or near each parcel proposed for sale, and subsequent completion of consultation required under Section 7 of the Endangered Species Act for any ESA listed species likely to be present on parcels proposed for leasing.
- a record that demonstrates that BLM has met the requirements set forth by the Bald and Golden Eagle Protection Act, including consulting with FWS prior to approving leasing in key habitat for bald and golden eagles.

The BLM should also ensure that it is abiding by any Memorandums of Understanding or Conservation Agreements that it has entered into with State Wildlife Agencies. Such interagency agreements are often a key component of efforts to ensure that species of concern do not continue to decline to the point where they require listing under the Endangered Species Act. If BLM fails to live up to the letter and spirit of these agreements with State Wildlife Agencies, then BLM may contribute to the need to list such species under the Endangered Species Act.

In addition, BLM should withdraw all of the protested parcels in the Vernal and Price Field Offices, pending completion of ongoing RMP revision. The Vernal and Price Field Offices are (or should be) considering changes in management or protective designation for the aforementioned special status species and lands of high conservation value, as part of the ongoing RMP revision process.

Finally, the BLM should ensure that leasing of the protested parcels will not contribute to the need to list special status species under the Endangered Species Act, and that leasing of the protested parcels will not result in unnecessary and undue degradation of sensitive habitat.

Whether to lease these lands, and if so, subject to what lease stipulations and mitigation measures, are decisions properly made after the BLM has conducted an adequate NEPA analysis of environmental impacts of reasonably foreseeable post-leasing oil and gas development, and after ongoing RMP revisions have been completed and finalized.

A. The leasing of the protested parcels absent full examination of the environmental consequences will violate the National Environmental Policy Act.

1. **The BLM has not conducted the required programmatic and site-specific NEPA analysis of the environmental consequences of reasonably foreseeable post-leasing oil and gas exploration and development, prior to leasing the protested parcels.**

The existing NEPA documents that the proposed leasing is tiered to, do not contain adequate programmatic analysis of the environmental consequences of oil and gas leasing and development on the protested parcels. The BLM MFPs and RMPs/EISs that this leasing is tiered to are outdated and do not consider significant new developments and information that bears directly on the type and magnitude of environmental impacts that are likely to result from the leasing of the lands in question for oil and gas development. The BLM is relying on outdated and inadequate NEPA analyses in making the decision to lease the protested parcels. The BLM is relying on Management Framework Plans (which are pre-NEPA documents, and do not include any NEPA analysis of environmental impacts) and/or Resource Management Plans and associated Environmental Impact Statements, and amendments to these plans (which often do not explicitly address oil and gas leasing) completed between 1982 and 1994. The proposed leasing in the Price Field Office is tiered to the Price Management Framework Plan, which was completed in 1982, and amended in 1983, 1989, and 1990; and the San Rafael Resource Management Plan and Final Environmental Impact Statement, completed in 1991. The proposed leasing in the Vernal Field Office is tiered to the Book Cliffs Proposed Resource Management Plan and Final Environmental Impact Statement completed in 1985, and the Diamond Mountain Resource Area Resource Management Plan, completed in 1994. The BLM is aware that these MFPs and RMPs are outdated and is currently revising them. The new Price Resource Management plan will cover the area previously covered by two plans, the Price River Resource Area Management Framework Plan, and the San Rafael Resource Management Plan and Final Environmental Impact Statement. BLM has completed a Draft RMP/EIS (completed in July 2004), and a Supplement to the Draft RMP/EIS (completed in September 2007), for the new Price Resource Management Plan. The final EIS and Proposed RMP are scheduled to be out in spring of 2008, with a ROD and Final RMP out in summer of 2008. Neither has been released at this time. The new Vernal Resource Management Plan will cover the area previously covered by the Book Cliffs Proposed Resource Management Plan and Final Environmental Impact Statement completed in 1985, and the Diamond Mountain Resource Area Resource Management Plan, completed in 1994. BLM has completed a Draft RMP/EIS (completed in July 2004), and a Supplement to the Draft RMP/EIS (completed in September 2007). The final EIS and Proposed RMP are scheduled to be out in spring of 2008, with a ROD and Final RMP out in summer of 2008. Neither has been released at this time. Thus, the BLM is relying on outdated information and analysis contained in fourteen to twenty-six year old programmatic documents in making its decision to lease the protested parcels. In the time since these documents were published, Utah has experienced greatly increased levels of mineral development. The level of mineral development currently occurring was not anticipated in the MFPs and RMPs/EISs that this leasing was tiered to. This level of mineral development is likely to result in environmental impacts that are much more significant than those analyzed in

fourteen to twenty-six year old MFPs and RMPs/EISs. In addition, the biological status of many of the species that will be impacted by the proposed leasing (greater sage-grouse, bald eagle, golden eagle, ferruginous hawk and burrowing owl, sensitive raptors, prairie dog, Duchesne milkvetch, Hamilton milkvetch, *Astragalus chloodes, Astragalus saurinus, Cymopterus duchesnensis,* and *Eriogonum saurinum*, and other rare and imperiled species) has changed significantly since the completion of the documents to which the proposed leasing is tiered. Many of these species have undergone significant population declines in Utah and across their range since the relevant MFPs and RMPs/EISs were completed. In addition, many of these species face new or increased threats to their long-term survival from a variety of factors, including oil and gas development, climate change, disease, increases in motorized recreation, increased habitat loss and fragmentation etc.. New scientific evidence also suggests that increasing levels of oil and gas development pose a major threat to a number of these species, and that lease stipulations currently relied upon by BLM to mitigate impacts to insignificance are ineffective. In addition, the taxonomic and/or regulatory status of some of these species has changed. Finally, the BLM has signed Memorandums of Understanding or Conservation Agreements aimed at preventing further declines of some of the aforementioned species, and leasing of the protested parcels absent adequate NEPA analysis and application of effective mitigation measures, may violate these agreements, and render interagency efforts to conserve imperiled species ineffective. The documents that the proposed leasing is tiered to, do not consider any of this substantial new information, and thus do not contain an adequate programmatic NEPA analysis of the direct, indirect and cumulative impacts of leasing of the protested parcels on any of the following resources: greater sage-grouse, bald eagle, golden eagle, ferruginous hawk and burrowing owl, sensitive raptors, prairie dog, Duchesne milkvetch, Hamilton milkvetch, *Astragalus chloodes, Astragalus saurinus, Cymopterus duchesnensis,* and *Eriogonum saurinum*, Heart of the West Conservation Plan Core Areas or Heart of the West Conservation Plan Corridors. We have provided BLM with new information on several of the above species, including, but not limited to greater sage-grouse and prairie dogs, in our previous protests of UT BLM oil and gas lease sales. The BLM is still relying on the same outdated NEPA documents that they relied upon in all of the previous oil and gas lease sales that CNE has protested in the past, and the significant new information provided on these species in previous lease protests is still relevant, therefore, we hereby incorporate the significant new information on any of the above species outlined in all of our previous protests by reference. Section F. of this protest illustrates these issues with the facts surrounding leasing of important habitat for greater sage-grouse.

Further, the BLM has not conducted the required site-specific NEPA analysis of reasonably foreseeable post-leasing oil and gas exploration and development, prior to issuing leases on the protested parcels. Programmatic NEPA analysis may be used to conduct broad scale analysis of the impacts of opening lands to oil and gas development, in order to inform and define the scope of subsequent site-specific NEPA analysis. However, it is not appropriate to use the vague, general NEPA analysis contained in MFPs and RMPs as a substitute for site-specific NEPA analysis at the point when a decision is made to allow surface disturbance in sensitive habitat. The National Environmental Policy Act, 42 U.S.C. § 4332(C), requires the BLM to take

a "hard look" at the environmental consequences of their proposed actions. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). When offering oil and gas leases for sale without stipulations prohibiting surface occupancy, the agencies must assess the environmental impacts of reasonably foreseeable post-leasing oil and gas development prior to issuance of the lease. See, e.g., Southern Utah Wilderness Alliance, 159 IBLA 220, 240-43 (2003); Pennaco Energy, Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147 (10th Cir. 2004); Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988); Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983).

The BLM recognizes the need for site-specific analysis of the environmental impacts of oil and gas development on the protested parcels, but intends to defer this analysis to later stages, such as submission of Applications for Permit to Drill (APDs) or proposals for full field development. The BLM justifies the decision to defer site-specific analysis to a later stage of the process, by arguing that lease issuance is a mere paper transaction, without on-the-ground consequences. However, the issuance of a federal oil and gas leas, without stipulations allowing BLM to preclude any surface disturbance, commits the leased parcel to development and conveys legal rights to the purchaser, regardless of the fact that additional federal actions will precede commercial drilling. See 43 C.F.R. § 3101.1-2. An oil and gas lease conveys "the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold." 43 C.F.R. §3101.1-2. This right is qualified only by "[s]tipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed." 43 C.F.R. § 3101.1-2. Following lease, unless drilling would violate an existing lease stipulation or a specific nondiscretionary legal requirement, land management agencies' ability to prevent impacts to other resources is limited to those "reasonable measures" that are "consistent with lease rights granted." Id.

Moreover, BLM has taken the position that any stipulations to protect resources must be attached to the lease itself. BLM Land Use Planning Handbook, App. C at 16 (2000) ("A determination that lands are available for leasing represents a commitment to allow surface use under standard lease terms and conditions unless stipulations constraining development are attached to leases"). Absent protective stipulations at the lease stage, the "reasonable measures" BLM believes that it may take to protect other resources from development are extremely limited. According to BLM regulations governing surface use rights conveyed with a lease, such reasonable measures are "consistent with lease rights granted" only if "they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year." 43 C.F.R. § 3101.1-2.

The Forest Service's position mirrors that of the BLM; surface exploration and development generally must be allowed, if requested by the leaseholder, once the lease is issued. *See* Oil and Gas Resources, 55 Fed. Reg. 10,423, 10,430 (Mar. 21, 1990)

(preamble to final Forest Service leasing regulations, stating "[t]his Department has determined that leases that are issued for National Forest System lands should vest the lessee with the right to conduct oil and gas operations somewhere on the lease").

The significance of this basic development right conveyed through oil and gas leasing, and federal agencies' positions on their limited ability to attach further conditions to that right, are well established in federal court precedent. In *Sierra Club v. Peterson*, the United States Court of Appeals for the District of Columbia Circuit addressed a Forest Service decision to authorize oil and gas leasing in the Bridger-Teton National Forest. 717 F.2d 1409 (D.C. Cir. 1983). The court specifically rejected the Forest Service's contention "that leasing is a discrete transaction which will not result in any physical or biological impacts." *Id.* at 1413 (internal quotations and citation omitted).

The Forest Service's position that leasing constitutes an irreversible decision whether to allow development is further confirmed by the agency's statements regarding proposed leasing in the context of approving applications to drill on existing leases on National Forest System lands. In addressing such drilling proposals, the Forest Service has steadfastly maintained that oil and gas lease rights severely constrain the agency's options to limit or prohibit development on an existing lease in the interest of other values.

The Forest Service has made its position clear that complete denial of operations on an existing federal oil and gas lease is permissible only in the extraordinary situation where the impacts from such operations would be so severe as to violate a substantive environmental law, by, for example, threatening the extinction of wildlife species in violation of the Endangered Species Act. 16 U.S.C. § 1536(a)(2). This reflects 43 C.F.R. § 3101.1-2's provision subjecting lease rights to "restrictions deriving from specific, nondiscretionary statutes."

It is highly likely that situations will arise where oil and gas development will result in environmental impacts that, although significant, would not violate lease stipulations or any substantive statutory prohibition. In such instances, it may often be the case that requiring that proposed roads or wellpads be moved 200 meters, or that surface disturbance be postponed for 60 days, may not mitigate environmental impacts to insignificance. For example, recent research (which we have described in detail in our previous protests of leasing of parcels containing greater sage-grouse habitat) suggests that oil and gas leasing and subsequent development on BLM lands has resulted in significant declines of greater sage-grouse populations, despite mitigation measures aimed at protecting greater sage-grouse that were applied as lease stipulations and 'reasonable measures' at the APD stage. However, since the greater sage-grouse is not yet listed under the Endangered Species Act, no substantive statute was violated.

Thus, it is clear that where, as here, the lease right allows surface occupancy, a significant commitment of resources is made at the time of lease issuance. This is an action with readily foreseeable on-the-ground consequences. See Conner, 848 F.2d 1441; Sierra Club

v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983). Accordingly, the appropriate time to analyze the need for protecting site-specific resource values is before a lease is granted.

As the Tenth Circuit Court of Appeals recently clarified, Park County Resource Council v. United States Dept. of Agriculture, 817 F.2d 609 (10th Cir. 1987) does not excuse the BLM from its obligation to analyze these consequences prior to leasing. Pennaco Energy, Inc. v. United States Dept. of the Interior, 377 F.3d 1147, 1162 (10th Cir. 2004). Park County may allow the agency to forego preparation of an Environmental Impact Statement if and when it has prepared an extensive environmental assessment covering the leases in question. This however, is not the case. The protested parcels have had no NEPA documentation prepared for them save MFP and RMP documents that clearly do not constitute adequate NEPA analysis of the environmental consequences of reasonably foreseeable post-leasing development.

Nor does reliance on RMP documents alone suffice for the core NEPA function of adequate consideration of alternatives. See Pennaco Energy, 377 F.3d at 1162 (explaining that documents such as "Determinations of NEPA Adequacy" cannot satisfy NEPA's "hard look" standard). Because none of the protested lease parcels are entirely non-waivable No Surface Occupancy ("NSO") leases, leasing, which confers specific rights to develop that the BLM and Forest Service cannot readily deny, is a concrete federal action with readily foreseeable environmental effects, and cannot legally go forward without NEPA analysis. See 43 C.F.R. § 3101.1-2.

Agencies are required to consider alternatives to a proposed action and must not prejudge whether it will take a certain course of action prior to completing the NEPA process. 42 U.S.C. §4332(C). CEQ regulations implementing NEPA and the courts make clear that the discussion of alternatives is "the heart" of the NEPA process. 40 C.F.R. §1502.14. Environmental analysis must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a). Objective evaluation is no longer possible after agency officials have bound themselves to a particular outcome (such as surface disturbance and occupation within these sensitive areas) by failing to conduct adequate analysis before foreclosing alternatives that would protect the environment (i.e. no leasing or NSO stipulations).

Sierra Club v. Peterson established the requirement that a land management agency undertake appropriate environmental analysis prior to the issuance of mineral leases, and not forgo its ability to give due consideration to the "no action alternative." 717 F.2d 1409 (D.C. Cir. 1983). This case challenged the decision of the Forest Service ("FS") and BLM to issue oil and gas leases on lands within the Targhee and Bridger-Teton National Forests of Idaho and Wyoming without preparing an EIS. The FS had conducted a programmatic NEPA analysis, then recommended granting the lease applications with various stipulations based upon broad characterizations as to whether the subject lands were considered environmentally sensitive. Because the FS determined that issuing leases subject to the recommended stipulations would not result in significant adverse impacts to the environment, it decided that no EIS was required at the leasing

stage of the proposed development. *Id.* at 1410. The court held that the FS decision violated NEPA:

> Even assuming, arguendo, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to *preclude* surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose "mitigation" measures upon a lessee . . . Thus, with respect to the [leases allowing surface occupancy] the decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.

Id. at 1414 (emphasis added). The appropriate time for preparing an EIS is prior to a decision "when the decision-maker retains a maximum range of options" prior to an action which constitutes an "irreversible and irretrievable commitment of resources[.]" *Id.* (*citing Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2nd Cir. 1977)).

Wyoming Outdoor Council held that challenged oil and gas leases were void because BLM did not consider reasonable alternatives prior to leasing, including whether specific parcels should be leased, appropriate lease stipulations, and NSO stipulations. The Board ruled that the leasing "document's failure to consider reasonable alternatives relevant to a pre-leasing environmental analysis fatally impairs its ability to serve as the requisite pre-leasing NEPA document for these parcels." Wyoming Outdoor Council, 156 IBLA 347, 357 (2002) *rev'd on other grounds by Pennaco Energy, Inc. v. US Dep't of Interior*, 266 F.Supp.2d 1323 (D. Wyo. 2003). The reasonable alternatives requirement applies to the preparation of an EA even if an EIS is ultimately unnecessary. *See* Powder River Basin Resource Council, 120 IBLA 47, 55 (1991); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 US 1066 (1989). Therefore, the BLM must analyze reasonable alternatives under NEPA prior to leasing.

Further, though Determinations of NEPA Adequacy (DNAs), can be used to assist the BLM in determining whether it can rely on existing documents for a current proposed action, DNAs are not NEPA documents, and cannot be used to supplement existing programmatic NEPA documents, or as a substitute for the required site-specific pre-leasing NEPA analysis. The BLM's DNAs for the leasing of the parcels at issue here, conclude that existing NEPA documents contain an adequate analysis of the environmental impacts of leasing of the protested parcels. The record demonstrates that this conclusion is arbitrary and capricious.

In the present case, the BLM is attempting to defer environmental review without retaining the authority to preclude surface disturbances. The BLM has not conducted an adequate site-specific NEPA analysis of the direct, indirect and cumulative impacts of reasonably foreseeable post-leasing oil and gas development on any of the following resources: greater sage-grouse, bald eagle, golden eagle, ferruginous hawk and burrowing owl, sensitive raptors, prairie dog, Duchesne milkvetch, Hamilton milkvetch, *Astragalus chloodes, Astragalus saurinus, Cymopterus duchesnensis,* and *Eriogonum*

saurinum, Heart of the West Conservation Plan Core Areas, and Heart of the West Conservation Plan Corridors. Further, the BLM does not consider an adequate range of alternatives to the proposed leasing in its programmatic NEPA analyses, and must conduct site-specific NEPA that analyzes an adequate range of alternatives, including no-leasing and no surface occupancy alternatives, and alternatives that analyze a range of various protective stipulations aimed at minimizing and mitigating the impacts to habitat for special status species within the protested parcels. Federal agencies must, to the fullest extent possible, use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment. 40 C.F.R. § 1500.2(e). "For all alternatives which were eliminated from detailed study," the agencies must "briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). The BLM must also analyze the effectiveness of lease stipulations and other mitigation measures that are aimed at mitigating the impacts of the proposed action to insignificance. This is particularly important given common sense and the best available science suggests that the lease stipulations attached to the parcels will not prevent significant impacts to the following resources: greater sage-grouse, bald eagle, golden eagle, ferruginous hawk and burrowing owl, sensitive raptors, prairie dog, Duchesne milkvetch, Hamilton milkvetch, *Astragalus chloodes, Astragalus saurinus, Cymopterus duchesnensis,* and *Eriogonum saurinum,* Heart of the West Conservation Plan Core Areas, and Heart of the West Conservation Plan Corridors. The BLM must analyze the likely effectiveness of the lease stipulations and other proposed mitigation measures on all of the aforementioned resources.

Significant impacts on special status species and lands of high conservation value may result from leasing of the protested parcels. The proposed lease stipulations are unlikely to prevent significant impacts to the special status species and lands of high conservation value within the protested parcels. Section F. of this protest illustrates these issues with the facts surrounding leasing of important habitat for greater sage-grouse.

C. Leasing the Protested Parcels Violates the ESA and the Bald and Golden Eagle Protection Act

1. General ESA duties

Endangered species and their habitat may present in many of the parcels we are protesting. The protested parcels may include habitat for listed species. The BLM is violating the ESA by offering the parcels we are protesting without conducting site-specific NEPA analysis to determine whether or not special status species, and particularly endangered species are present on the lease parcels; and by failing to apply lease stipulations that will adequately protect listed species that may be discovered on lease parcels in the future, from adverse effects of oil and gas exploration and development.

Since BLM has not conducted any site-specific NEPA analysis, it is possible that the protested parcels contain habitat for listed species. If this is the case, then the BLM must

conduct Section 7 consultations prior to leasing the protested parcels. *See, Conner v. Burford*, 848 F.2d 1441, 1452 (9th Cir. 1988)(the ESA consultation process is triggered when the surface agency is notified of a pending lease sale).

Courts have recognized that oil and gas leases are federal actions that may affect listed species or critical habitat, and that they therefore may not proceed without completion of the consultation process. *See* 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *Conner v. Burford,* 848 F.2d 1441, 1455 (9th Cir. 1988) (BLM could not issue oil and gas leases until FWS analyzed consequences of all stages of leasing plan in Biological Opinion).

Alternatively, the parcels must be sold with non-waivable NSO stipulations over the entirety of the parcels in order to insure and guarantee that the agency's action does not result in jeopardy to the existence of any endangered species or threatened species or result in the destruction or adverse modification of such species' habitat. *See e.g.*, *Wyoming Outdoor Council v. United States Forest Service*, 165 F.3d 43, 49-50 (D.C. Cir. 1999)(where an agency does not retain its authority to preclude all surface-disturbing activities after lease issuance, it constitutes an irreversible and irretrievable commitment of agency resources); *Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988)("[U]nless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretrievable commitment of resources by selling non-NSO leases.").

It is unlawful for the BLM to lease the parcels absent consultation with the USFWS or without non-waivable NSO stipulations where the BLM acknowledges the presence of endangered or threatened species. *Conner*, 848 F.2d 1441, 1452-58 (ESA's consultation requirement is not met by "incremental steps" and by mere notification of the potential presence of endangered species). Analyzing the impacts to endangered species at the exploration and development stage after the BLM has already issued a lease allowing oil and gas development is insufficient for purposes of complying with the ESA.

Through consultation with USFWS, the BLM must determine whether the potential exploration, development, and/or production of oil and gas related activities will jeopardize endangered and threatened species in these parcels. This consultation must be conducted prior to making an irretrievable commitment of resources by selling non-NSO leases. Failure to do otherwise is arbitrary, capricious, and an abuse of discretion. *See, Conner*, 848 F.2d 1441, 1453("we hold that agency action [for purposes of developing a biological opinion]...entails not only leasing but leasing and all post-leasing activities through production and abandonment.").

We are not aware of the BLM having conducted any site-specific surveys or NEPA analysis to determine whether listed species are present in the protested parcels, or to analyze the direct, indirect and cumulative impacts of leasing of the protested parcels on ESA listed species. In addition we are not aware of the BLM having solicited or received comments from FWS on the proposed leasing. The BLM must therefore withdraw the parcels that we are protesting that contain ESA-listed species and/or habitat until it meets both its NEPA requirements and its Section 7 consultation requirements.

The BLM must therefore either withdraw the parcels that we are protesting that may contain ESA-listed species and/or habitat for these species or impose non-waivable NSO stipulations on the entirety of the parcels we are protesting that may contain listed species/habitat until it meets its Section 7 consultation requirements.

In addition, the BLM should not lease parcels in habitat for Bald and Golden Eagles, unitl BLM has met the requirements set forth by the Bald and Golden Eagle Protection Act, including consulting with FWS prior to approving leasing in key habitat for bald and golden eagles.

D. NEPA Prohibits Interim Actions that have adverse effects and/or limit the choice of reasonable alternatives

NEPA regulations require that, while BLM is in the process of an EIS, such as during revision or amendment of a RMP, the agency must not take any action concerning a proposal that would "[l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1. *See also* 40 C.F.R. § 1502.2(f) (while preparing environmental impact statements, federal agencies "shall not commit resources prejudicing selection of alternatives before making a final decision"). BLM has historically interpreted this NEPA regulation to require that proposed actions that could prejudice selection of any alternatives under consideration "should be postponed or denied" in order to comply with 40 C.F.R. § 1506.1, and the Land Use Planning Handbook previously contained this direction. Another section of this same regulation directs that while BLM is preparing a required EIS "and the [proposed] action is not covered by an existing program statement," then BLM must not take any actions that may "prejudice the ultimate decision on the program." 40 C.F.R. § 1506.1(c). The regulation continues that "[i]nterim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives." *Id.* (emphasis added).

The official position of the Department of Interior ("DOI"), which comports with federal caselaw, is that the BLM must consider impacts arising from oil and gas exploration and development on these leases before leasing. *See, e.g.*, Southern Utah Wilderness Alliance, 159 IBLA 220, 240-43 (2003) ("SUWA"); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147 (10th Cir. 2004); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983). Leasing these parcels now, while RMPs are being revised, violates NEPA's prohibition on interim actions. According to 40 C.F.R § 1506.1(a):

> Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would:
>
> (1) Have an adverse environmental impact; or
> (2) Limit the choice of reasonable alternatives.

1. Leasing the parcels at this time would undermine the RMP revision process

The BLM routinely cites recent Instruction Memoranda ("IM") in its assertion that leasing should continue under existing RMPs whether or not they have expired, and whether or not the public has submitted new information suggesting that the RMP's allocation of certain lands for leasing will result in unacceptable environmental consequences. Even though the BLM's internal guidance takes the misguided position that there are very few triggers for additional NEPA analysis before leasing, the BLM is still compelled to comply with NEPA and its implementing regulations. Many of these IMs have been released recently, and often the next one tweaks the position of the last – it's highly possible that the BLM's current position will be overturned either by the courts or internally in the future. The statutes that apply to leasing must trump a flawed internal interpretation.

RMP revision will be a waste of taxpayers' money and participants' time if the BLM approves leasing in the planning areas prior to RMP revision. Past agency directives correctly recognized that *any* leasing will constrain the choice of reasonable alternatives. Therefore, the agency followed a policy of no new leasing – even of lands designated open – for areas undergoing RMP revisions focused on oil and gas development. Absent such policy, any new leasing must be conditioned on findings that adequate NEPA analysis has been performed.

Under no circumstances should BLM approve new leasing of sensitive lands while the RMP revisions go forward. Offering sensitive lands without adequate NEPA analysis cannot proceed independently of the RMP revisions.

The Federal Land Policy and Management Act ("FLPMA") requires that land management actions be "in accordance with the land use plans developed" by the Secretary of the Interior. 43 U.S.C. § 1732(a). The regulations provide that "resource management action[s] shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment." 43 C.F.R. § 1601.0-5(b). "All resource management authorizations and actions and detailed and specific planning undertaken subsequent to the RMP must conform to the RMP. . . BLM is required to manage . . . as outlined in the RMP, until or unless the RMP is amended pursuant to 43 CFR 1610.5-5." Marvin Hutchings, 116 IBLA 55, 62 (1990).

One of the critical issues the BLM addresses during RMP amendment is whether and which areas should be open to leasing in the first place. BLM Handbook 1624, Planning For Fluid Mineral Resources (or H-1624-1). H-1624-1, for instance, requires BLM in the amendment and revision process to look at areas open to leasing in any capacity, open to leasing with restrictions, open to leasing with NSO and areas open to leasing with special stipulations of conditions of approval. H-1624-1, Ch. IV. B., C.2. "During the amendment or revision process, the BLM should review all proposed implementation actions [this includes oil and gas leasing] through the NEPA process to determine

whether approval of a proposed action would harm resource values so as to limit the choice of reasonable alternative actions relative to the land use plan decisions being reexamined." H-1601-1 at VII.E.

Leasing *prior* to the RMP revisions will undermine the planning process. As an irretrievable commitment of resources, leasing will severely limit the range of alternatives. This violates the amendment process and agency policy.

NEPA §102(2)(C)(v) was intended to ensure that environmental impacts would "not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "The appropriate time for considering the potential environmental impacts of oil and gas exploration and development under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), is when BLM proposes to lease public lands for oil and gas purposes because leasing, at least without NSO stipulations, constitutes an irreversible and irretrievable commitment of resources by permitting surface disturbing activities in some form and to some extent." Wyoming Outdoor Council, 156 IBLA 347 (2002). See also Colorado Environmental Coalition, 149 IBLA 154, 156 (1999); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983); Wyoming Outdoor Council, 153 IBLA 379 (2000) (emphasis added).

The BLM has the opportunity to learn from the planning mistakes and resulting environmental damage occurring in federally managed oil and gas fields elsewhere in the Rockies. In the Powder River Basin in Wyoming and Montana, the Upper Green Country in Wyoming, and Farmington, New Mexico, the BLM leased out practically all mineral lands under its jurisdiction *before* conducting required analyses of the impacts of such a blanket leasing program. When a high percentage of lands are under lease, the BLM has severely limited its ability to limit environmental impacts.

BLM needs to comply with NEPA, FLPMA and other applicable law through the RMP revisions *before* leasing more lands for oil and gas development. At the post-leasing phase, the BLM has already made an irretrievable commitment of resources. Leasing ties the BLM's hands and it loses the opportunity to consider such alternatives as no leasing, leasing subject to NSO, phased development, baseline data collection, and mitigation measures identified through the NEPA process. See Doing It Right, A Blueprint for Responsible Coal Bed Methane Development in Montana -- http://www.northernplains.org/files/Doing_It_Right.pdf/view.

The existing RMPs are inadequate and outdated for current and reasonably anticipated levels of oil and gas development. There is an urgent need for comprehensive planning and consistent management direction.

The conservation community is committed to working with the BLM constructively on the RMP revision process. The Wilderness Society, Center for Native Ecosystems, and a number of other conservation organizations have commented on the drafts of the revised management plans for both the Vernal and Price RMPs. We have commented

specifically on management of oil and gas leasing, including decisions regarding what lands should be open to oil and gas development, and on management of special status species, including many of the species present on the protested parcels. Issuance of new oil and gas leases while the revision process is ongoing, will prejudice the outcome of the RMP revision process, render the considered input of the conservationists and other citizens moot, and limit the alternatives that can be considered in formulation of the new Resource Management Plan.

D. BLM cannot rely on the proposed stipulations and conditions of approval to mitigate impacts to insignificance

NEPA allows the agency to institute mitigating measures in order to render the action "insignificant," however the BLM has wholly failed to do so. Before the BLM can rely on the relevant lease stipulations as mitigation measures, it is "required to adequately study any measure identified as having a reasonable chance of mitigating a potentially significant impact of a proposed action and reasonably assess the likelihood that the impact will be mitigated to insignificance by the adoption of that measure." Klamath Siskiyou Wildlands Ctr., 157 IBLA 332, 338 (2002). "NEPA requires an analysis of the proposed mitigation measures and how effective they would be in reducing the impact to insignificance." *Id.* (quoting Powder River Basin Resource Council, 120 IBLA 47, 60 (1991).

The record is does not support the agency's conclusion that assorted stipulations will effectively mitigate impacts on greater sage-grouse, bald eagle, golden eagle, ferruginous hawk and burrowing owl, sensitive raptors, prairie dog, Duchesne milkvetch, Hamilton milkvetch, *Astragalus chloodes, Astragalus saurinus, Cymopterus duchesnensis,* and *Eriogonum saurinum,* Heart of the West Conservation Plan Core Areas, from oil and gas development. The record itself establishes that the BLM failed to analyze the proposed measures and their effectiveness, as required under NEPA.

For example, the lease notices aimed at protecting sensitive raptor habitat, burrowing owl habitat, ferruginous hawk habitat, golden eagle habitat, special status plants, Utah sensitive species, and greater sage-grouse habitat, from significant impacts, state only that the lessee is given notice that lands in a given lease have been identified as containing the species in question and its habitat, and that seasonal restrictions and/or modifications to the Surface Use Plan of Operations "may be required in order to protect [the species and/or habitat in question] in accordance with Section 6 of the lease terms, the Endangered Species Act, and 43 C.F.R. 3101.1-2." However, none of the above species are currently listed under the Endangered Species Act, and thus will not receive any of the statutory protections of the ESA. In addition, once the lease is issued, BLM can only apply mitigation measures that are 'consistent with lease rights granted', namely relocating proposed surface disturbance or structures by 200 meters, or imposing timing restrictions of less than 60 days. These measures will not necessarily be sufficient to mitigate impacts to the aforementioned species to insignificance. These measures are unlikely to prevent significant direct, indirect and cumulative impacts, including for example, impacts associated with cumulative habitat loss and fragmentation, disturbance

that occurs in sensitive time periods during the production phase of oil and gas development, changes in runoff patterns, runoff from spills of toxic materials, increased human use of an area and associated disturbance from noise, poaching, trampling etc., impacts associated with water depletion from nearby streams etc. Research on greater sage-grouse (which we have detailed in previous protests of Utah BLM lease sales in habitat for greater sage-grouse) demonstrates that these lease stipulations will not prevent significant impacts to greater sage-grouse from oil and gas development. In addition, in the case of the greater sage-grouse, BLM specifically notes that the lease notice may be waived, excepted or modified. With respect to greater sage-grouse nesting and brooding habitat and white-tailed prairie dog habitat, it appears that BLM may have retained the authority to require more significant modifications to the surface use plan of operations. However, BLM has not retained the authority to withhold approval of surface disturbance. Finally, the lease stipulation applied to bald eagles, states that the bald eagle is federally listed under the Endangered Species Act. However, the bald eagle is no longer listed under the Endangered Species Act. It is unclear whether the lease notice aimed at mitigating impacts to Bald Eagles, applies now that the species is no longer listed under the Endangered Species Act.

The BLM's conclusion that the lease notices and stipulations applied to the protested parcels will mitigate impacts on special status species to insignificance, absent any NEPA analysis of the likely effectiveness of these measures, is arbitrary and capricious. BLM must either apply a No Surface Occupancy stipulation to these parcels, or conduct a NEPA analysis that adequately studies any measure identified as having a reasonably chance of mitigating a potentially significant impact, and reasonably assess the likelihood that the impact will be mitigated to insignificance by the adoption of that measure; prior to leasing the protested parcels

F. Greater Sage-Grouse

We are very concerned about the proposed leasing of important habitat for the imperiled greater sage-grouse in the upcoming oil and gas lease sale absent adequate NEPA analysis of the impacts of the proposed leasing on greater sage-grouse. We have discussed the general legal issues with issuing leases in habitat for special species and areas of high conservation value absent adequate NEPA analysis, and of leasing in habitat for threatened and endangered species without adequate protective stipulations. We feel that the facts surrounding the proposed issuance of leases in greater sage-grouse habitat are illustrative of these larger issues with BLM's oil and gas leasing program and the proposed leasing of the all of the protested parcels that contain habitat for special status species, and therefore discuss these facts in greater detail below.

Effects of oil and gas drilling on greater sage-grouse have only recently been investigated, and none of the relevant RMPs took the potential direct, indirect and cumulative impacts of oil and gas drilling on greater sage-grouse into account. On April 21, 2004, FWS made a positive 90-day finding on several petitions to list the greater sage grouse under the Endangered Species Act. CNE is one of the greater sage-grouse petitioners. The Service later made a negative 12-month finding. The court then

overturned this finding, citing blatant political interference in the decision making process, and ordered FWS to conduct a new status review. It is very important to note that FWS made clear that part of its rationale for not supporting listing, at the time of the 12-month finding, was that draft conservation strategies were in place. It is becoming apparent that these draft conservation strategies will not be sufficient to prevent further declines and eventual listing if the BLM does not address the direct, indirect and particularly cumulative effects of its oil and gas leasing program. The FWS's 90-day finding included the following sections that address the sage grouse's status and the threat that oil and gas development poses to this species.

> Using our population estimates in the August 24, 2000 Federal Register notice, sage-grouse population numbers may have declined between 69 and 99 percent from historic to recent times (65 FR 51578). The WSSCSTGTC (1999) estimated the decline between historic and present day to have been about 86 percent. (69 Fed. Reg. 21486 (April 21, 2004))
>
> Sage-grouse populations in Colorado have declined from 45 to 82 percent since 1980. (69 Fed. Reg. 21487 (April 21, 2004))
>
> Proposed coal-bed methane development in the Powder River Basin of Wyoming is expected to result in the loss of 21,711 ha (53,626 ac) of sagebrush shrublands by 2011 (Bureau of Land Management 2003). Current sage-grouse habitat loss in the basin from coal-bed methane is estimated at 2,024 [ha, sic] (5,000 ac) (Braun *et al.* 2002). Although reclamation of short-term disturbances will be concurrent with project development, 'sage-grouse habitats would not be restored to predisturbance conditions for an extended period because of the time need [sic] to develop sagebrush stands with characteristics that are preferred by sage-grouse.' (Bureau of Land Management 2003a). Disturbance to other sage-grouse habitats, such as late summer/brood-rearing areas, was not quantified in the Final Environmental Impact Statement for this project, but 'disturbance would occur to all other habitat types, including nesting, brood rearing, and wintering areas that are located more than 0.25 miles from lek sites' (Bureau of Land Management 2003a). (69 Fed. Reg. 21488 (April 21, 2004))
>
> In addition to the direct habitat loss previously mentioned, associated facilities, roads, and powerlines, as well as noise and increased human activities (*see* discussion under Factor E) associated with mining and energy development, can fragment sage-grouse habitats (Braun 1998; Connelly *et al.* 2000). More chronic impacts are less clear. Lek abandonment as a result of oil and gas development has been observed in Alberta (Connelly *et al.* 2000), and, in the Powder River Basin of Wyoming, leks within 0.4 km (0.25 mi [sic]) of a coal-bed methane well have significantly fewer males compared to less disturbed leks (Braun *et al.* 2002). The network of roads, trails, and powerlines associated with

> wells and compressor stations decreases the suitability and availability of sage-grouse habitat, and fragments remaining habitats (Aldridge and Brigham 2003). Human activities along these corridors can disrupt breeding activities and negatively affect survival (Aldridge and Brigham 2003). Female sage-grouse captured on leks near oil and gas development in Wyoming had lower nest-initiation rates, longer movements to nest sites, and different nesting habitats than hens captured on undisturbed sites (Lyon 2000; Lyon and Anderson 2003). Lower nest-initiation rates can result in lower sage-grouse productivity in these areas (Lyon and Anderson 2003). Activities which remove live sagebrush and reduce patch size negatively affect all sagebrush obligates (Braun *et al.* 2002). (69 Fed. Reg. 21490 (April 21, 2004))
>
> As with fences, powerlines provide perches for raptors (Connelly *et al.* 2000; Vander Haegen *et al.* 2002, cited in Knick *et al.* 2003), thereby resulting in sage-grouse avoidance of powerline corridors (Braun 1998). Approximately 9656 km (6,000 mi [sic]) of powerlines have been constructed in sage-grouse habitat to support coal-bed methane production in Wyoming's Powder River Basin within the past few years. Leks within 0.4 km (0.25 mi [sic]) of those lines have significantly lower growth rates than leks further from these lines, presumably as the result of increased raptor predation (Braun *et al.* 2002). The presence of powerlines also contributes to habitat fragmentation, as greater sage-grouse typically will not use areas immediately adjacent to powerlines, even if habitat is suitable (Braun 1998). (69 Fed. Reg. 21490 (April 21, 2004))
>
> Lyon (2000) found that successful sage-grouse hens nested farther (mean distance = 1,138 m) from the nearest road than did unsuccessful hens (mean distance = 268 m) on Pinedale Mesa near Pinedale, Wyoming. (69 Fed. Reg. 21490 (April 21, 2004))
>
> In Wyoming's Powder River Basin, leks within 1.6 km (1 mi [sic]) of coal-bed methane facilities have consistently lower numbers of males attending than leks farther from these types of disturbances. Noise associated with these facilities is cited as one possible cause (Braun *et al.* 2002). (69 Fed. Reg. 21493 (April 21, 2004))

The Service summed up, "This finding is based primarily on the historic and continued destruction, modification, or curtailment of greater sage-grouse habitat or range, and the inadequacy of existing regulatory mechanisms in protecting greater sage-grouse habitats throughout the species' range" (69 Fed. Reg. 21494 (April 21, 2004)).

By leasing parcels with known sage grouse habitat with inadequate protective stipulations, the BLM is contributing to the need to list this species both through promoting additional habitat destruction and by confirming that its regulatory mechanisms are inadequate to prevent the extinction of the species.

The Vernal and Price RMPs were finalized fourteen to twenty-six years ago. Many of the references cited in FWS's positive 90-day finding were published well after the relevant RMPs and MFPs considered the effects of oil and gas development on greater sage grouse in Utah. Further new information has become available subsequent to the FWS's positive 90-day finding. Four new relevant studies have become available between 2005 and the present, including three peer reviewed studies that have become available in 2007. Holloran (2005) presents results of a study of greater sage-grouse population response to natural gas field development in Western Wyoming. Naugle et al. (2006a) analyze greater sage-grouse population response to coal-bed methane development in the Powder River Basin. Naugle et al. (2006b) analyze greater sage-grouse winter habitat selection and energy development in the Powder River Basin. The studies detailed in the unpublished manuscript (Naugle et al. 2006a), and progress report (Naugle et al. 2006b) described above, have been completed and are now in press awaiting publication in peer reviewed journals (Walker et al. in press, Doherty et al. in press). Walker et al. (in press) analyze greater sage-grouse population response to energy development and habitat loss. Doherty et al. (in press) analyze the impacts of energy development on winter habitat selection. Finally Walker et al. (2007) estimate infection rate of West Nile virus in a greater sage-grouse population. The Colorado Division of Wildlife (CDOW) recognizes the importance of some of the new information outlined above, in their recent comments on the Colorado BLM's draft Little Snake Resource Management Plan. CDOW recommends substantial changes to the Colorado BLM's draft Little Snake Resource Management Plan, based on this new information (CDOW 2007). The CDOW states that:

> "...more information about the impacts of oil and gas development on sage grouse has been reported since spring, 2006 than was known before. Matt Holloran's work in Wyoming (Holloran 2005) was just beginning to become widely available in the spring of 2006. Holloran found that greater sage-grouse lek attendance declined as oil and gas activity developed with eventual abandonment of leks occurring with time and higher density of gas development. Additionally, he documented that significant additional mortality of adults occurred at higher surface densities. Holloran also suggests that existing greater sage-grouse habitat protection stipulations applied by the BLM in Wyoming are inadequate to protect sage grouse at large scales and high levels of development. Dave Naugle's initial work on effects of oil and gas (coal-bed methane) development on greater sage-grouse in the Powder River Basin was released in June, 2006...His findings are currently undergoing peer review and are expected to be published in a peer reviewed journal soon. His work (Naugle et al. 2006a) supports many of the findings in Holloran (2005) and further fleshes out the surface density at which substantial impacts on greater sage-grouse occur. He reports that impacts on lek attendance began to occur at surface spacings at or above 1 well pad per 640 acres, and those impacts became significant between 1 well pad per 320 acres, and 1 well pad per160 acres..." (pg. 3).

CDOW goes on to state that:

> "Naugle et al. (2006b) also found that the presence of development affected use of winter ranges by greater sage-grouse. It is becoming widely suggested that surface spacings at or below 1 well pad per 80 acres eventually eliminates greater sage-grouse from these habitats. Naugle et al. (2006a) also report that current BLM stipulations are inadequate to protect greater sage-grouse in the Powder River Basin, where wells are spaced at relatively close densities. He [Naugle] has proposed that the only way to protect greater sage-grouse at a landscape scale in the face of significant oil and gas development is to develop and maintain use areas within critical occupied habitat. Dave Naugle is currently employed as a science advisor by BLM in Washington, D.C. for the 2006-2007 academic year." (pg. 4)

The CDOW further states that:

> "Evidence from Montana and Wyoming suggests that greater sage-grouse may be extirpated from areas if large refuge areas are not set aside devoid of oil and gas development." (p. 5)

Finally, the CDOW notes that:

> "Research in Wyoming and Montana (Holloran 2005, Naugle et al. 2006a) indicates that current BLM stipulations to protect greater sage-grouse, including .25 mile radius lek buffers are not protecting leks as expected in areas of significant energy development." (p. 9, *emphasis added*)

Finally, on page 16, the DOW notes that:

> "Research in Montana and Wyoming has indicated that lease stipulations designed to protect sage grouse, namely timing restrictions on drilling and 0.25 mile no surface occupancy restrictions have not prevented grouse declines in natural gas and coalbed methane fields. (CDOW comments on Colorado BLM's Draft Little Snake RMP). (*emphasis added*)

The Colorado Division of Wildlife is beginning to recognize that existing regulatory mechanisms, including standard lease stipulations, may be inadequate to protect the greater sage-grouse from declines associated with oil and gas development. CDOW states:

> "Given the scope and intensity of oil and gas development in the West, listing of Greater sage-grouse under the ESA is likely in the near future if some plan for maintaining them is not developed and funded." (CDOW comments on Colorado BLM's Little Snake Draft RMP)

> "Several approaches to mitigating impacts of energy development have been tried or proposed. The classic approach used by BLM who manages leases on Federal mineral rights, is to apply stipulations to protect wildlife (conditions on the operator) at the time the lease is granted. For a variety of reasons, including a weak scientific knowledge base, failure to consider cumulative effects (*emphasis added*), etc., this approach has largely failed." (CDOW comments on Colorado BLM's Little Snake Draft RMP)

The CDOW goes on to state that:

> "Creating refuges in time and space is emerging as the leading strategy for reducing impacts, both because stipulations have not been completely effective and because they are very costly to industry...Against this backdrop we were asked to evaluate areas where wildlife values are so high that energy development should not be allowed, either forever or for some period of time." (CDOW comments on Colorado BLM's Little Snake Draft RMP)

The CDOW went on to explore a refuge concept, in which they identify core refuge areas for sage grouse. They suggest that protection of these core refuge areas be coupled with mitigation of oil and gas development on off-refuge sites is necessary to protect sage grouse populations. CDOW states that, "Available evidence indicates that sage-grouse are highly sensitive to even low-intensity disturbance associated with energy development, particularly on leks/breeding areas but also on winter range." (CDOW comments on Colorado BLM's Little Snake Draft RMP)

CDOW used the best available evidence including the new evidence outlined earlier in this discussion, to identify core refuge areas for sage grouse. CDOW states, "In order to identify core refuge areas for sage grouse, the DOW GIS group mapped intersections of three GIS layers: 4-mile buffers around active leks, 5-year average numbers (density) of males on leks, and sage brush patch sizes. This identified areas most critical to sage grouse and presumably other sagebrush obligates."

CDOW then goes on to recommend that, "These core refuge areas would be off-limits to any energy development or production activity until development in non-core areas was completed and successfully rehabilitated."

Utah BLM should follow Colorado Division of Wildlife's example, and seriously take into consideration new information on the potential impacts of oil and gas drilling on greater sage-grouse.

New evidence also suggests that West Nile virus is a new threat to sage grouse, and coal bed methane development may increase the odds of exposure to this disease. This also should be analyzed before considering leasing. In addition, the BLM has developed a national plan for sage grouse conservation, and Colorado should be careful that its leasing

program does not preclude conservation measures that may prove necessary to prevent the extinction of this species.

There is clearly new information that should be considered that suggests that potentially significant direct, indirect and cumulative effects to the greater sage-grouse are likely to result from sale of the protested lease parcels. The new information suggests that the lease stipulations generally relied upon by the BLM to prevent significant impacts to sage-grouse are inadequate and will likely result in extirpations. This new information has never been considered in any of the NEPA documents that this leasing is tiered to. The Utah BLM is relying upon the following lease stipulations to mitigate the impacts of oil and gas drilling on sage-grouse to insignificance:

> UT-LN-51: "The lessee/operator is given notice that lands in this lease have been identified as containing habitat for named species on the BLM Sensitive Species List and the Utah Sensitive Species List. Modifications to the Surface Use Plan of Operations may be required in order to protect any sensitive Species and/or habitat from surface disturbing activities in accordance with Section 6 of the Oil and Gas Lease Terms, Endangered Species Act, and 43 CRF 3101.1-2. This notice may be waived, excepted, or modified by the authorized officer if either the resource values change or the lessee/operator demonstrates that adverse impacts can be mitigated."
>
> and
>
> UT-LN-44: "The lessee/operator is given notice that this lease parcel has been identified as containing potential sage grouse brooding and wintering habitat. Modifications to the Surface Use Plan of Operations may be required in order to protect the sage grouse and habitat from surface disturbing activities."

These lease stipulations are completely inadequate and will not protect the greater sage-grouse from significant direct, indirect and cumulative impacts that will result from leasing of the parcels protested herein. The first stipulation only allows BLM to require modifications to the Surface Use Plan of Operations to protect greater sage-grouse within the parameters set by Section 6 of the Oil and Gas Lease Terms and 43 C.F.R. 1301.1-2. Section 6 of the Oil and Gas Lease Terms states the following:

"Conduct of operations – Lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users. Lessee shall take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with lease rights granted, such measure may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specifications of interim and final reclamation measures. (*emphasis added*)"

Measures "consistent with lease rights granted" is defined by 43 C.F.R. 1301.1-2 as follows:

"At a minimum, measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year."

Thus, this lease stipulation only allows the BLM to ask the operator to move a proposed well pad, road, pipeline, or other oil and gas infrastructure location by up to 200 meters (0.12 miles), or put a seasonal restriction on surface disturbing operations for up to 60 days in order to protect greater sage-grouse habitat. All of the best available science suggests that this stipulation is inadequate to mitigate the impacts to greater sage-grouse into insignificance.

The second lease stipulation may allow more significant modifications to the surface use plan of operations, but does not allow BLM to preclude oil and gas development and associated surface disturbance, even if a post-leasing NEPA analysis suggests that there will be significant impacts to greater sage-grouse.

In a November 22, 2006 ruling on Center for Native Ecosystems' appeal of Utah BLM's March 17, 2003 denial of CNE's February 3, 2003 oil and gas lease sale protest, the IBLA states that:

> "The appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public land for oil and gas purposes, because leasing without stipulations requiring no surface occupancy constitutes an irreversible and irretrievable commitment to permit surface disturbing activity" (170 IBLA 331).

The IBLA also states that:

> "Although BLM may use DNAs to determine whether new NEPA documentation is required, DNAs cannot be properly used to supplement previous EAs or EISs or to address site-specific environmental effects not previously considered in them." (170 IBLA 332)

None of the NEPA documents that leasing is tiered to directly consider the potential direct, indirect and cumulative effects of oil and gas drilling on greater sage-grouse habitat, or address significant new information available on the status of this species and the likely impacts of widespread oil and gas development on the status of this species, nor does the record demonstrate that the agency took the necessary "hard look" to determine whether these new circumstances and information warranted new analysis or supplementation of existing NEPA documents. Further, it is not proper to rely on the stipulations in the lease notice (described above) to determine that the sale of the lease parcels is not likely to have significant adverse effects on greater sage-grouse. In the same finding discussed above, the IBLA states that:

> "A finding that impacts of issuing an oil and gas lease would not be significant due to the mitigative effects of a ...stipulation must be based on NEPA analysis. The stipulation does not provide a basis for deferring an environmental analysis in the absence of an existing NEPA statement that includes an analysis of the mitigative effects of the stipulation (170 IBLA 332)...Although BLM attached a stipulation to the leases for the protection of special status species, BLM has identified no NEPA document containing an analysis of the mitigative effect of that stipulations..."

The BLM has failed to comply with NEPA's procedural requirement to prepare an environmental analysis describing the effects of the proposed action on the greater sage-grouse, or the adequacy of its stipulation to mitigate potential impacts of sale of these parcels for oil and gas development. This failure may result in an irreversible and irretrievable commitment of resources, and in BLM contributing to the need to list the greater sage-grouse under the ESA – especially given that the best available scientific information suggests that the stipulations relied upon are utterly inadequate to mitigate impacts to greater sage-grouse to insignificance. There is no evidence available to suggest that the roughly 1/10 of a mile (0.12 kilometer) buffer from surface disturbing activities, and less than 60-day timing restriction on surface disturbing activities allowed by the stipulation (UT-LS-51) will protect sage-grouse leks and other important habitats. In reference to the standard ¼ mile buffer around sage-grouse leks included in Wyoming BLM's oil and gas lease sale stipulations to protect sage-grouse, Dave A. Roberts Wyoming Wildlife Program Leader, BLM, states:

> "...The BLM started using the ¼ mile distance, for lack of anything better, along with the rest of the published guidelines, back in the late 1960's. Over a period of time (now over 3 decades) the ¼ mile distance just evolved into a de facto guideline or standard, through routine, everyday usage, even though there was not any real, empirical, scientific evidence to either support or refute its usage.." (in a 1998 affidavit submitted in response to Jonah oil and gas field development appeal)

The best available evidence indicates that one of the stipulations in question here (UT-LS-51), will not be adequate to protect greater sage-grouse from significant impacts associated with leasing of the protested parcels. Walker et al. (in Press), find that "Current lease stipulations that prohibit development within 0.4 km [1/4 mile] of sage-grouse leks on federal lands are inadequate to ensure lek persistence and may result in impacts to breeding populations over larger areas. Seasonal restrictions on drilling and construction do not address impacts caused by loss of sagebrush and incursion of infrastructure that can affect populations over long periods of time."

As discussed earlier, the lease stipulation intended to mitigate impacts of leasing of the protested parcels on greater sage-grouse, only allows for: 1) a prohibition on development within 0.2 kilometers [approx 1/10 mile] of sage grouse leks or other important habitats, and 2) a seasonal restriction of, 60 days on drilling and construction. The best available scientific evidence clearly indicates that this stipulation is inadequate

to mitigate the impacts of leasing of the protested parcels on greater sage-grouse to insignificance. Leasing of the protested parcels will clearly result in significant direct, indirect and cumulative impacts to greater sage-grouse.

Thus, The BLM must conduct NEPA analysis and take a "hard look" at how its oil and gas program is affecting the greater sage-grouse. Additional leasing should not occur in any sage grouse habitat until the BLM finishes this analysis and the Field Offices responsible for management of sage grouse habitat reevaluate their management of this species, including their oil and gas programs.

The BLM's management of the sage grouse has already resulted in major declines across the species' range. The BLM is clearly contributing to the need to list this species by moving forward with leasing in important greater-sage grouse habitat without taking the required 'hard look' at the potential direct, indirect and particularly cumulative impacts; particularly given that the best available science clearly demonstrates that the lease stipulation relied upon to protect greater sage-grouse from significant impacts is inadequate. Leasing parcels in important sage-grouse habitat before the BLM has done the appropriate NEPA analysis, and before RMP revision is complete, is highly inappropriate, and violates NEPA's prohibition on interim actions. All parcels in greater sage-grouse habitat should be withdrawn until the BLM has completed RMP revision and/or the additional supplemental NEPA analysis that takes the required 'hard look' at the direct, indirect and cumulative effects that leasing of these parcels would have on greater sage-grouse populations. The BLM must ensure that its activities do not contribute to the need for ESA listing, and must meet its sensitive species obligations for sage grouse.

G. The BLM has the discretion not to lease the protested parcels

Under the statutory and regulatory provisions authorizing this lease sale, the BLM has full discretion whether or not to offer these lease parcels for sale. The Mineral Leasing Act, 30 U.S.C. § 226(a), provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil and gas deposits may be leased by the Secretary." (emphasis added). The Supreme Court has concluded that this "left the Secretary discretion to refuse to issue any lease at all on a given tract." Udall v. Tallman, 380 U.S. 1, 4 (1965); see also Wyoming ex rel. Sullivan v. Lujan, 969 F.2d 877 (10th Cir. 1992); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985) ("While the [Mineral Leasing Act] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory."); Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975).

Submitting a leasing application vests no rights to the applicant or potential bidders. The BLM retains the authority not to lease. "The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved." *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.* 383 U.S. 912 (1966). *See also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir.

1988); *Pease v. Udall*, 332 F.2d 62 (9th Cir. 1964); *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839 (D.C. Wyo. 1981).

The arguments laid out in detail above demonstrate that exercise of the discretion not to lease the protested parcels, is appropriate and necessary. Withdrawing the protested parcels from the lease sale until BLM has met its legal obligations to conduct and adequate NEPA analysis etc. is a proper exercise of BLM's discretion under the MLA. The BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with applicable law.

III. CONCLUSION & REQUEST FOR RELIEF

CNE therefore requests that the BLM withdraw the protested parcels from the June 5th Sale.

Sincerely,

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Staff Biologist
Center for Native Ecosystems